

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTA RENEE STEINMETZ

Claimant

VS.

UNITED PARCEL SERVICE

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,009,382

ORDER

Respondent appeals the November 2, 2006 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was awarded a 70 percent permanent partial general disability. The Appeals Board (Board) heard oral argument on March 6, 2007.

APPEARANCES

Claimant appeared by her attorney, James R. Shetlar of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. What are the appropriate dates of accident?
2. Was respondent provided timely notice of accident for the alleged accidents in 2000 and 2002? Respondent admits timely notice of

accident for the injuries suffered through claimant's last day worked with respondent on August 27, 2004.

3. Did claimant provide timely written claim for the accident alleged to her right wrist in 2000?
4. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified.

Claimant began working for respondent as a loader on August 24, 1998. After two years, claimant was transferred to the grey belt, and then took the "pickoff" test, which she passed. She began doing the pickoff job in 2000. This job required that claimant stand at a conveyor belt and sort packages as they came by. These packages weighed between 1 and 100 pounds, and came at the rate of approximately 1,500 to 2,000 per hour.

Claimant began noticing the formation of cysts on her wrists while doing the pickoff job. The first cyst formed on claimant's right wrist in August 2000. Claimant was treated by board certified orthopedic surgeon Lanny W. Harris, M.D., who performed surgery on the cyst on claimant's right wrist on September 15, 2000. This surgery was paid for by claimant's health insurance. Claimant did not report this injury to respondent until March 2003.

In October 2002, claimant experienced a specific incident where, while picking up a large flat box, she felt a shooting pain in her left arm. Shortly thereafter, a cyst formed on claimant's left wrist. In December 2002, claimant was again seen by Dr. Harris for the cyst on claimant's left wrist. Surgery to remove the cyst was performed on December 24, 2002. Again, the surgery was paid for by claimant's health insurance and no claim for this alleged injury was brought to respondent until March 2003, when claimant's attorney sent a certified letter to respondent, with an application for hearing.

In March 2003, claimant began reporting right elbow problems to her supervisor (Tanza) and requested medical treatment for the elbow condition. Claimant was later advised that the insurance company handling respondent's workers compensation coverage was denying the claim. Claimant continued treating with Dr. Harris, who performed a differential bone scan of both wrists on March 3, 2003. This bone scan showed increased activity in both wrists. Claimant also underwent an MRI of the left wrist on March 17, 2003, which indicated mild degenerative arthritis on the thumb side of

claimant's wrist and edema in the carpal bones. Dr. Harris continued to treat claimant's left wrist only until April 11, 2003. In April 2003, when claimant came to Dr. Harris's office for an injection in the left wrist, claimant advised the doctor that she had symptoms in her right wrist and the medial aspect of her left elbow as well. When Dr. Harris examined claimant on June 2, 2003, claimant had continued aching in her left wrist. Even so, she was released from Dr. Harris's care. In his May 20, 2004 report, Dr. Harris expressed concern that as long as claimant continued to perform heavy work, she would continue to have upper extremity problems.

Dr. Harris saw claimant on October 27, 2003, for the purpose of providing an impairment rating. At that time, Dr. Harris assessed claimant a 10 percent impairment to the right upper extremity and a 20 percent impairment to the left upper extremity.

Dr. Harris next saw claimant on January 26, 2004, at which time claimant complained of chronic right elbow pain. After an MRI of the right elbow on January 29, 2004, Dr. Harris diagnosed chronic medial epicondylitis, which he stated can come from repetitive use. Dr. Harris continued to treat claimant's right elbow until August 2004, when he ordered an EMG of the elbow. This test showed moderate cubital tunnel syndrome. Based on his physical examination of claimant and the EMG, Dr. Harris performed surgery on claimant's right elbow on September 15, 2004. Claimant's elbow condition improved, but not enough for heavy lifting.

Dr. Harris continued to treat claimant through March 2005. In his letter of March 14, 2005, he assessed claimant a 3 percent permanent partial impairment of the right upper extremity at the level of the elbow, and a 20 percent impairment to the right upper extremity at the level of the shoulder for loss of strength and function, for a combined 22 percent permanent partial disability to the right upper extremity at the level of the shoulder. Claimant's functional impairment included the earlier 12 percent functional impairment assessed by Dr. Harris in 2003. Claimant's rating to her left upper extremity did not change. Dr. Harris determined that the medial epicondylitis in claimant's right upper extremity was a new and distinct injury, separate from the earlier cyst conditions for which he had provided claimant treatment. An FCE performed on April 5, 2005, indicated claimant could perform work at the light level. Claimant's unilateral carry on the right side was 22 pounds and her unilateral carry on the left side was also 22 pounds. Claimant was unable to do the lifting required at respondent.

Claimant was examined at claimant's attorney's request by board certified orthopedic surgeon Truett L. Swaim, M.D., on May 24, 2005. Dr. Swaim diagnosed claimant with status post bilateral ganglion cyst excisions, removal of carpal boss on the left side, right elbow medial epicondylectomy and ulnar nerve transposition, persistent medial epicondylitis of the right elbow and mild bilateral de Quervain's syndrome. He opined that claimant's cumulative traumas suffered to her upper extremities while working for respondent were substantial contributing factors to claimant's ongoing upper extremity

difficulties and ongoing need for treatment. Dr. Swaim rated claimant pursuant to the fourth edition of the *AMA Guides*¹ at 22 percent of the left upper extremity and 37 percent of the right upper extremity.

Claimant was referred by the ALJ for an independent medical examination to orthopedic surgeon Brian J. Divelbiss, M.D., on January 17, 2006. Claimant advised the doctor of her past bilateral carpal tunnel surgeries, bilateral dorsal wrist ganglion excisions and right elbow ulnar nerve transposition and medial epicondylar debridement. Claimant told the doctor that her right carpal tunnel surgery in 1985 was successful, resulting in her being asymptomatic from a numbness standpoint. However, claimant reported that the numbness returned in 2000. The numbness in 2000 was only intermittent. Claimant also reported strength deficits in the right upper extremity.

Claimant reported numbness and tingling in the left upper extremity, specifically in the ring and small fingers, which she described as “frequent”. Claimant also reported left elbow pain, with radiculopathy down the medial aspect of her forearm. Dr. Divelbiss diagnosed claimant with bilateral upper extremity trauma, with claimant’s employment listed as a significant contributing factor to the continuation of her symptoms. He rated claimant at 25 percent impairment of the left upper extremity secondary to loss of strength and worsening neurologic symptoms of both ulnar nerve neuritis and median neuritis, and 20 percent impairment to the right upper extremity secondary to residual sensory deficits and grip strength loss. Dr. Divelbiss’ ratings were pursuant to the fourth edition of the *AMA Guides*.²

In workers compensation litigation, it is the claimant’s burden to prove her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The Board will first determine the appropriate date or dates of accident in this matter. Claimant first noted symptoms in her right wrist in August 2000. She was treated by Dr. Harris for a cyst on the right wrist, with surgery on September 15, 2000. Claimant began having symptoms in her left wrist in October 2002, and was again referred to Dr. Harris. A ganglion cyst was removed from her left wrist on December 24, 2002. Claimant remembered a specific incident in October 2002 when she moved a 70-pound box and felt a shooting pain up her left arm. In considering the appropriate date of accident with regard to claimant's ganglion cysts, the Board must consider a long line of cases dealing with date of accident in cumulative trauma cases.

When dealing with a series of injuries which occur microscopically over a period of time, the Kansas appellate courts have established a bright line rule for identifying the date of injury in a repetitive, microtrauma situation for injuries occurring before July 1, 2005. The date of injury for repetitive injuries in Kansas has been determined to be either the last day worked or the last day before the claimant's job is substantially changed.⁶

The Kansas Supreme Court, in *Treaster*,⁷ discussed repetitive trauma cases in detail. One of the cases discussed and approved was *Anderson*,⁸ which held the date of accident or occurrence is the last day the claimant performs services for his or her employer and is required to stop working as a direct result of pain and disability. Here, claimant worked until forced to stop work for surgery on the cysts, the right in September 2000 and the left in December 2002. There is no evidence in this record that claimant's bilateral cysts worsened after her return to work with respondent. Therefore, the date of accident for the cyst in claimant's right wrist was September 14, 2000, and for the left wrist, December 23, 2002. Respondent contends that claimant failed to provide timely notice of these accidents.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.⁹

⁵ K.S.A. 44-501(a).

⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

⁷ *Treaster, supra*.

⁸ *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 960 P.2d 768 (1998).

⁹ K.S.A. 44-520.

This record supports respondent's argument. Claimant failed to notify respondent of these problems, choosing instead to submit the costs for the medical procedures to her health insurance companies. Notice of these procedures and these injury claims was not provided to respondent until March 5, 2003, when claimant's attorney submitted a certified letter and application for hearing on the claims. Notice of these injuries was not timely submitted, and claimant's claim for workers compensation benefits is denied for these injuries. Respondent also alleges claimant failed to provide timely written claim for the injuries suffered in relation to the cyst on claimant's right wrist.

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .¹⁰

The Board has found claimant's date of accident with regard to the cyst on claimant's right wrist to be September 14, 2000. Claimant did not submit written claim for this injury until March 5, 2003, well after the 200-day limit set by the statute. The Board finds claimant has failed to submit timely written claim for the cyst injury on claimant's right wrist.

Respondent argues that claimant's award in this matter should be limited to a right upper extremity award only. This record does not support respondent's position. While the Board has found claimant not entitled to an award for the ganglion cysts, those conditions are not the full extent of claimant's upper extremity injuries. Bone scans of claimant's wrists indicated increased activity in both wrists, with an MRI showing mild degenerative arthritis on the thumb side of the left wrist, and edema in the carpal bones. Dr. Swaim found claimant with mild bilateral de Quervain's syndrome. Dr. Divelbiss diagnosed claimant with bilateral upper extremity cumulative trauma complaints. All three doctors (Drs. Harris, Swaim and Divelbiss) found claimant's upper extremity conditions to be, at least partially, the result of claimant's continued employment with respondent.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹¹

¹⁰ K.S.A. 44-520a(a).

¹¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.¹²

The Board finds claimant suffered upper extremity injuries,¹³ including de Quervain's syndrome bilaterally, ulnar nerve injuries in claimant's right elbow, and significant repetitive trauma to her wrists from her ongoing employment with respondent.

Claimant's date of accident for these traumatic injuries would be claimant's last date of employment with respondent, as claimant continued to perform her regular duties through her last day of employment on August 27, 2004.

Respondent raised the issue of the nature and extent of claimant's injuries in its application to the Board. The ALJ, in the Award, determined that claimant had suffered a 27 percent permanent disability to the body as a whole on a functional basis based on the medical rating provided by Dr. Divelbiss. The ALJ further determined that claimant suffered a 70 percent permanent partial work disability based upon a 100 percent wage loss and a 40 percent task loss, pursuant to K.S.A. 44-510e. However, after the Award was entered by the ALJ, but before the Board reached its decision, the Kansas Supreme Court, in *Casco*,¹⁴ dramatically changed workers compensation litigation as it relates to bilateral micro-trauma injuries in Kansas. Before *Casco*, claimant's bilateral upper extremity injuries would have been calculated as a whole body impairment under K.S.A. 44-510e, and the ALJ's Award would have been appropriate. The Court, in *Casco*, overruling 75 years of precedent with regard to bilateral micro-trauma injuries, found them to no longer be outside the statutory schedule of injuries found in K.S.A. 44-510d. The Court instead found a statutory presumption that a combination of injuries, as itemized in K.S.A. 44-510c(a)(2), creates a rebuttable presumption of permanent total disability. However, the permanent total disability status, when so rebutted, limits claimant's award to separate scheduled injuries under K.S.A. 44-510d.

The Board finds no support in this record that claimant is permanently and totally disabled. The presumption of permanent total disability is rebutted by the fact that claimant applied for and received 26 weeks of unemployment benefits, applied for over 200 jobs and testified that there were jobs she could perform. Additionally, two vocational experts, Dick Santner and Michael J. Dreiling, testified that there were jobs claimant could do within her ability. Therefore, after considering *Casco*, the Board finds claimant's injuries must be calculated as two separate scheduled injuries.

¹² *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

¹³ *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

¹⁴ *Casco v. Armour Swift-Eckrich*, ___ Kan., ___, 154 P.3d 494, rev. denied ___ Kan. ___ (2007).

In reviewing the record, the Board finds no justification to place greater weight on the opinion of one health care provider over any other. Therefore, in considering the opinions of Dr. Swaim, Dr. Harris and Dr. Divelbiss, the Board finds claimant has suffered a 28 percent permanent partial disability to her right upper extremity at the level of the shoulder and a 22 percent permanent partial disability to her left upper extremity. Therefore, the findings and conclusions of the ALJ, contained in the Award of November 2, 2006, are modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 2, 2006, should be, and is hereby, modified to award claimant a 28 percent permanent partial disability to her right upper extremity at the level of the shoulder and a 22 percent permanent partial disability to her left upper extremity at the level of the forearm.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Marta Renee Steinmetz, and against the respondent, United Parcel Service, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred through a series of traumatic injuries through claimant's last date of employment, August 27, 2004, and based upon an average weekly wage of \$282.86 through April 29, 2005, and an average weekly wage of \$375.70 as of April 30, 2005.¹⁵

For the right upper extremity, claimant is entitled to 27 weeks of temporary total disability compensation at the rate of \$188.58 per week totaling \$5,091.66, followed by 8 weeks of permanent partial disability compensation at the rate of \$188.58 per week totaling \$1,508.64, followed by 47.44 weeks permanent partial disability at the increased rate of \$250.48 totaling \$11,882.77 for a 28 percent permanent partial disability to the right upper extremity, making a total award of \$18,483.07. As of the date of this award, the entire award would be due and owing and ordered paid in one lump sum, minus any amounts already paid.

For the left upper extremity, claimant would be entitled to 35 weeks permanent partial disability compensation at the rate of \$188.58 totaling \$6,600.30, followed by 9 weeks permanent partial disability compensation at the increased rate of \$250.48 totaling \$2,254.32 for a 22 percent permanent partial disability to the left upper extremity,

¹⁵ The average weekly wage is \$282.86 through April 29, 2005. Effective April 30, 2005, the cost of fringe benefits in the amount of \$92.84 would be added to the average weekly wage, making a final average weekly wage of \$375.70.

making a total award of \$8,854.62. As of the date of this award, the entire award would be due and owing and ordered paid in one lump sum, minus any amounts already paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.¹⁶

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of May, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

¹⁶ K.S.A. 44-536(b).